

February 9, 1990

MEMORANDUM

TO: The Honorable Charles Toguchi  
Superintendent of Education

ATTN: Antonette Port, Personnel Specialist

FROM: Lorna J. Loo, Staff Attorney

SUBJECT: Disclosure of an Individual's Birthdate and Social  
Security Number

This is in response to your request for an advisory opinion regarding whether the Department of Education ("DOE") may disclose an individual's birthdate and social security number contained in a government record to the National Association of State Directors of Teacher Education and Certification ("NASDTEC") under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes.

ISSUE PRESENTED

Whether, under the UIPA, the DOE may disclose an individual's birthdate and social security number contained in a government record to NASDTEC.

BRIEF ANSWER

No. The DOE's disclosure of an individual's social security number and birthdate to NASDTEC would constitute a clearly unwarranted invasion of personal privacy under the UIPA since the individual's significant privacy interest in the information outweighs the public interest in the contemplated disclosure to NASDTEC. Federal and state case law recognizes

the significant privacy interest attributed to an individual's social security number and birthdate. On the other hand, there is little public interest in disclosure of this information under the UIPA since disclosure would do little to shed any light on government conduct. Yet, an individual's social security number and birthdate are publicly disclosable in other specific instances in accordance with the UIPA.

#### FACTS

The DOE would like to enter into a proposed agreement with NASDTEC to participate in a nationwide program for the exchange of information about individuals whose certificates to teach or administer in schools have been denied, revoked, suspended, or otherwise adversely acted upon ("former licensees"). Under the proposed agreement, the DOE would release information about former licensees, including their names, social security numbers,<sup>1</sup> birthdates, and certification status, to NASDTEC, a private non-profit organization. According to the proposed agreement, the State shall only provide names and other information that are publicly disclosable in general.

The information submitted to NASDTEC will be compiled with similar information furnished by other cooperating states, and the compiled information will then be distributed to the certifying agency of each cooperating state. NASDTEC will engage ACADEM, a California partnership, to administer the compilation and distribution of the information.

The DOE requested the Department of Attorney General to review the proposed agreement with NASDTEC. In a letter dated December 22, 1988, to the Superintendent of Education, from Russell Suzuki, Deputy Attorney General, it was advised that birthdates and social security numbers are not public information under the UIPA. You have requested that the Office of Information Practices ("OIP") provide an advisory opinion interpreting the UIPA.

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<sup>1</sup> A social security number is the account number exclusively assigned to an individual to designate that individual's account in the federal Social Security system. Social security numbers are also commonly used as an identifier by other government agencies and in the private sector.

## DISCUSSION

### **A. Introduction**

The UIPA states the general rule that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). Notwithstanding this mandate for public access to government information, the UIPA does provide exceptions to the general rule in section 92F-13, Hawaii Revised Statutes. Under a relevant exception, the UIPA does not permit an agency to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1989). According to the UIPA, "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1989).

Therefore, an application of this exception based on personal privacy involves a "balancing" of the individual's privacy interest against the public interest in disclosure of the records. According to the UIPA's legislative history, "[i]f the privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S. J. 689, 690 (1988).

### **B. The Privacy Interest in an Individual's Social Security Number and Birthdate**

The UIPA's legislative history suggests that "[t]he case law under the Freedom of Information Act should be consulted for additional guidance" regarding an individual's privacy interest. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S. J. 1093, 1094 (1988). In case law applying the federal Freedom of Information Act (FOIA), an individual's privacy interest in social security numbers has been found to outweigh the public interest in disclosure. International Brotherhood of Electrical Workers Local Union No. 5 v. U.S. Dep't. of Housing and Urban Development, 852 F.2d 87 (3d Cir. 1988) ("I.B.E.W."); accord Swisher v. Dep't. of the Air Force, 495 F. Supp. 337 (W.D. Mo. 1980). See generally J. O'Reilly, Vol. II Federal Information Disclosure . 16.06 (1989).

In I.B.E.W., the court found that a significant privacy interest exists in social security numbers maintained in an agency record of a federal contractor's payroll. The court came to this conclusion based upon Congress' recognition of a significant privacy interest in social security numbers by its adoption of section 7 of the federal Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. . 552a, to protect this interest. As the court noted, Congress recognized that "the extensive use of Social Security numbers as universal identifiers in both the public and private sectors is `one of the most serious manifestations of privacy concerns in the Nation.'" I.B.E.W., 852 F.2d at 89, citing S. Rep. No. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 6943.

For similar reasons, the Massachusetts appellate court applying state law in Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880 (Mass. App. Ct. 1988), also found a significant privacy interest in individuals' social security numbers maintained in drivers' license applications. As the court noted, public access to social security numbers may permit access to other collections of personal records about individuals and allow the creation of "new, more comprehensive banks of information" about those individuals. Id. at 887. The court also cautioned that the Registrar must comply with section 7 of the Privacy Act governing the collection of social security numbers. Id. at 888.

When discussing the significant privacy interest in social security numbers, the courts in I.B.E.W. and Registrar of Motor Vehicles both referred to Section 7 of the federal Privacy Act. This section of the Privacy Act prohibits, with qualifications, government agencies from denying an individual any right, benefit, or privilege under law on account of the individual's refusal to disclose his or her social security number. This law further requires that when a federal, state, or local government agency requests an individual's social security number, it shall inform the individual in advance whether disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.<sup>2</sup> Privacy Act of 1974, Pub.L. 93-579, . 7, 88

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<sup>2</sup> To comply with section 7 of the Privacy Act, the OIP's proposed draft rules on records collection practices incorporate the federal law's requirements.

Stat. 1896, 1909 (1974), reprinted in 5 U.S.C. . 552a note (1988). It appears that the privacy interest in social security numbers must be significant in order to warrant Congress' recognition of the individual's prerogative not to disclose a social security number to a government agency and the right to be notified of the agency's uses of it when disclosed. See I.B.E.W., 852 F.2d at 89.

The OIP previously opined that individuals have a significant privacy interest in their social security numbers listed on an agency waiting list for the award of homestead leases, see OIP Op. Ltr. No. 89-4 (Nov. 9, 1989); and on a roster of inmates incarcerated at a correctional facility, see OIP Op. Ltr. No. 89-14 (Dec. 15, 1989); but see OIP Op. Ltr. No. 89-8 (Nov. 20, 1989) (the UIPA expressly requires public disclosure of certified payroll records, and information such as social security numbers cannot be sanitized from these records, if included therein).

FOIA case law also indicates that an individual has a substantial privacy interest in the disclosure of that individual's birthdate. Ditlow v. Shultz, 379 F. Supp. 326 (D.D.C. 1974). In Ditlow, the court applied the balancing test under the FOIA privacy exemption and subsequently determined that a clearly unwarranted invasion of privacy would occur by the disclosure of the contents of an individual's customs declaration form that included, among other information, the individual's birthdate. Cf. Multnomah County Medical Society v. Scott, 825 F.2d 1410 (9th Cir. 1987). In Multnomah County Medical Society, the court noted that disclosure of the names and addresses of Medicare beneficiaries would also indicate their qualification to be Medicare beneficiaries, based on age or disability status, and would compromise their right not to make public these personal details in the absence of a countervailing public interest. Id. at 1416.

State courts have similarly found a significant privacy interest in an individual's birthdate because it indicates the individual's age. Pasik v. State Board of Law Examiners, 451 N.Y.S.2d 570, 577 (N.Y. Sup. Ct. 1982) (ages of persons who graded or developed questions for bar examination); Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880, 886 (Mass. App. Ct. 1988) (birthdates provided on drivers' license applications). In finding a substantial privacy interest in an individual's birthdate, the court in Registrar of Motor Vehicles stated that if an individual's age is revealed along with

financial condition, the individual, "particularly one of advanced years, may become the target of those who would like to share in his or her wealth." Id. The court also noted that disclosure of an individual's age also may permit "access to additional files" as may disclosure of social security numbers. Id. at 887.

We also believe that disclosure of an individual's birthdate may subject the individual to unwanted prejudice based on that individual's age. This may occur particularly where the birthdate is requested in conjunction with other personal, although public, information like an individual's name and occupational licensure status, as would be provided to NASDTEC under the proposed agreement.

### **C. The Public Interest in Disclosure**

The courts that have considered the relative interests in an individual's social security number have generally found that no public interest has been shown to offset the significant privacy interest recognized in the disclosure of this personal information. I.B.E.W., 852 F.2d 87; Registrar of Motor Vehicles, 528 N.E.2d 880. Similarly, no countervailing public interest has been shown to warrant the invasion of the substantial privacy interest recognized for an individual's birthdate. Ditlow, 379 F. Supp. 326; Pasik v. State Board of Law Examiners, 451 N.Y.S.2d 570; Registrar of Motor Vehicles, 528 N.E.2d 880.

There may be a merit in the proposed disclosure to NASDTEC of former licensees' social security numbers and birthdates. For instance, disclosure of these personal identifiers would assist in a more accurate identification of a former licensee and prevent an erroneous identification of a current licensee who by chance has the same name, thereby facilitating the certification of teachers in other states. In addition, the State would benefit from the receipt of similar information from other participating states.

On the other hand, the public disclosure of individuals' social security numbers and birthdates would facilitate the cross-checking of information about the individuals in other records maintained by government and the private sector. Registrar of Motor Vehicles, 528 N.E.2d at 887. See also Vol. I Report of the Governor's Committee on Public Records and Privacy 152 (1987) (recognition that social security numbers are used in

cross-checking information between files.) There will certainly be extensive public disclosure and circulation of former licensees' social security numbers and birthdates under the proposed agreement with NASDTEC. Specifically, the proposed agreement provides that the information about former licensees will be provided to a private business for compilation and distribution nationwide to all participating states. In addition, once the information is in the possession of these persons, there would be no legal restrictions on further disclosures to other parties. "There is a negative public interest in placing the private affairs of so many individuals in computer banks available for public scrutiny." Registrar of Motor Vehicles, 528 N.E.2d at 886.

We have previously referred to FOIA case law in assessing what public interest is to be weighed against an individual's privacy interest in personal records. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989). In OIP Opinion Letter No. 89-16, we discussed the United States Supreme Court's recent holding in a significant FOIA decision, U.S. Dep't. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. \_\_\_, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). In Reporters Committee, the Court held that in balancing the public interest in disclosure against an individual's privacy interest under 5 U.S.C. . 552(b) (7) (C), only a FOIA-based public interest in disclosure may be considered. After reviewing the FOIA's legislative history, the Court concluded that:

This basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language," [citation omitted] indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case--and presumably in the typical case in which one private citizen is seeking information about another--the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Id. 489 U.S. at \_\_\_, 109 S. Ct. at 1481, 103 L. Ed. 2d at 796, (emphasis added); see OIP Op. Ltr. No. 89-16.

After the Reporters Committee decision, the United States Court of Appeals for the District of Columbia, in two separate cases, held that the Reporters Committee's holding about the relevant public interest applied equally to the balancing required by Exemption (b)(6) of the FOIA, which is nearly identical to the exception based on privacy under the UIPA, in section 92F-13(1), Hawaii Revised Statutes. National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (names and home addresses of retired and disabled federal employees); Federal Labor Relations Authority v. U.S. Dep't. of the Treasury, 884 F.2d 1446 (D.C. Cir. 1989) (names and home addresses of federal employees); see OIP Op. Ltr. No. 89-16.

In applying the Reporters Committee decision and its progeny to the question presented by the DOE, we believe that the disclosure of former licensees' social security numbers and birthdates to NASDTEC would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. We do not believe that disclosure of this information to NASDTEC would shed any light on the DOE's conduct, its duties, or on "what the agency is up to." The public disclosure of the former licensees' names and certification status will, however, shed light on DOE's conduct with regard to teacher certification, and the UIPA expressly makes this information public. Haw. Rev. Stat. . 92F-12(a)(13) (Supp. 1989). Although the DOE's receipt of information from other participating states may provide some insight into the DOE's certification of individuals, there is little public interest in the DOE's disclosure of former licensees' social security numbers and birthdates to NASDTEC when this disclosure, by itself, does not directly reveal government conduct.

Furthermore, the access interest of a particular requester is not a determining factor in balancing the public interest in disclosure against an individual's privacy interest. Reporters Committee, 489 U.S. at \_\_\_, 109 S. Ct. at 1480-1481, 103 L. Ed. 2d at 794. Consequently, NASDTEC's purpose for requesting former licensees' social security numbers and birthdates cannot be considered in balancing the public and privacy interests in disclosure.

We, however, recognize that an individual's birthdate, social security number, or both are typically found in some



government records required by law to be public, including index data on vital statistics, section 338-18(d), Hawaii Revised Statutes; voter registration affidavits, section 11-15, Hawaii Revised Statutes; and a general county register of registered voters, Section 11-14, Hawaii Revised Statutes. Where a state or federal law expressly authorizes a government record to be disclosed, disclosure will be required by the UIPA notwithstanding an applicable exception. Haw. Rev. Stat. . 92F-12 (b)(2) (Supp. 1989). If an individual's social security number or birthdate is contained in a government record required to be public, this information is accordingly made public as part of that public government record.

Furthermore, an individual's social security number or birthdate may be contained in the government records listed in section 92F-12, Hawaii Revised Statutes, which are expressly made public under the UIPA. For these particular records, the Legislature has essentially performed a "balancing" of competing privacy and public interests and has deemed that the public interest in disclosure is greater. The records listed in subsection 92F-12(a), Hawaii Revised Statutes, are records "which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy . . . are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988).

There may also be instances where the public interest will outweigh the personal privacy interest in disclosure of an individual's social security number or birthdate. Compare Tennessee Newspaper, Inc. v. Levi, 403 F. Supp. 1318 (M.D. Tenn. 1975) (no substantial privacy interest in the age of an individual who is arrested or indicted). Nevertheless, under the facts presented, we find that former licensees have a significant privacy interest in their social security numbers and birthdates as was similarly attributed to individuals licensed to drive and other individuals in the above-referenced court cases. Disclosure of this information to NASDTEC may serve other purposes, but is not found to substantially serve the relevant public interest under the UIPA in revealing "what government is up to."

#### CONCLUSION

The privacy interest in the disclosure of a former licensee's social security number and birthdate, contained in the DOE's records, outweighs the public interest in disclosure

to NASDTEC. The former licensees' birthdates and social security numbers, along with certification information, would be compiled and distributed nationwide to participating states by private entities. The privacy interest in this information is significant because of the invasion of an individual's privacy resulting from the practice of cross-checking between records. In addition, disclosure of an individual's birthdate may subject the individual to prejudice directed at that age category.

In contrast, since disclosure of former licensees' social security numbers and birthdates to NASDTEC will not reveal government conduct, disclosure is not in the public interest under the standard enunciated in the Reporters Committee decision. Because the significant privacy interest in a former licensee's social security number and birthdate outweighs the public interest in disclosure, disclosure of this information would constitute a clearly unwarranted invasion of personal privacy and is not permitted under the UIPA. Yet, disclosure of an individual's social security number or birthdate is authorized in other specific circumstances in accordance with the UIPA, none of which exists under the facts presented.

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Lorna J. Loo  
Staff Attorney

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APPROVED:

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Kathleen A. Callaghan  
Director